IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-869

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

INDEX TO CITATIONS

Statutes:

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Petitioner[1] Brotherhood of Railway and Airline Clerks [hereinafter "BRAC"], an intervenor in the proceedings before the United States Court of Appeals for the Second Circuit urging reversal of a decision by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"],

[1]Respondents to this instant petition are: The United States of America, and the Interstate Commerce Commission, respondents below; American Trucking Associations, Inc. and twenty-four motor carriers, intervenors in support of respondents below; REA Express, Inc., a bankrupt, and C. Orvis Sowerwine, Trustee, petitioners below; and Alltrans Express, U.S.A., Inc., an intervenor in support of petitioners below. Petitioner BRAC has been informed that REA Express, Inc., and its trustee, C. Orvis Sowerwine, will also be filing in this Court a petition for a writ of certiorari.

respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 16, 1977.

ORDERS AND OPINIONS BELOW

The judgment and opinion of the Court of Appeals for the Second Circuit was entered on September 16, 1977, and is not yet officially reported. It is reproduced as Appendix A to this petition. The initial Report and Order of the Interstate Commerce Commission which was the subject of this review proceeding was decided on November 17, 1976, and was served on November 19, 1976. It is reproduced as Appendix B to this petition. On January 27, 1977, the Commission decided various petitions to reconsider and to intervene, and on January 28, 1977, the Commission issued that decision. It is reproduced as Appendix C to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on September 16, 1977, and this petition for a writ of certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's ostensible reliance on Rule 247(f) of its Rules of Practice to dismiss an application for permanent authority for the "hub system" and to thereafter mechanically rely on that dismissal as a basis for revoking a temporary authority was arbitrary, capricious and an abuse of discretion?

2. Did the Court of Appeals and the Commission err in not considering the drastic effect that the Commission's decision to effectively end REA would have upon the reemployment and monetary rights of REA's thousands of long and faithful employees?

STATUTES AND REGULATIONS INVOLVED

Sections 206(a)(1) and 210a(a) of the Interstate Commerce Act, 49 U.S.C. §§306(a)(1), and 310a(a), are involved in this case and are reproduced in Appendix D to the petition. Rule 247(f) of the Commission's Rules of Practice, 49 C.F.R. §1100.247(f) (1976) (now, Rule 247(g)), is also material to this petition and has been reproduced in Appendix D to this petition. The pertinent portion of Rule 247(f) reads as follows:

> An applicant who does not intend timely to prosecute its application, shall promptly request dismissal thereof. Failure to prosecute an application under procedures ordered by the Commission will result in dismissal thereof. . . .

STATEMENT OF THE CASE

Railroads had provided an express package service for many years by the early 1900's, and in 1929 the railroads created the Railway Express Agency, Inc., a non-profit agency, to perform that express service. *See, Securities and Acquisition of Control of Railway Ex. Agency,* 150 I.C.C. 423 (1929). REA, however, was not designed to be profitable, and by 1969 with the drastic decline in intercity rail passenger service, the railroads "extricated themselves from its ownership." App. A at 5a. REA Express, Inc. emerged as an independent company carrying on the business of Railway Express, and continued to employ

thousands of employees, most of whom were represented by petitioner BRAC under the Railway Labor Act, 45 U.S.C. §151, *et seq.*

Historically, REA was intertwined with the rail systems for its routes, and by 1968 found itself "with an uncoordinated and unmanageable system of interlocking rail and motor routes." App. A at 5a. In order to solve that problem, REA proposed in 1968 a fundamental restructuring of its routes and submitted an application to the ICC under Section 206 of the Interstate Commerce Act, 49 U.S.C. §306, for permanent operating authority under what has become known as the "Hub system" — *i.e.*, twenty-four central points for the receipt and dispatch of traffic. Upon application of REA, the Commission on June 3, 1968, granted REA temporary authority under Section 210a(a) of the Act, 49 U.S.C. §310a(a). J.A. at 877.[2] REA continued to operate, primarily under that temporary authority, until November 6, 1975.

On February 18, 1975, REA Express, Inc. and its affiliated companies filed petitions with the United States District Court for the Southern District of New York pursuant to the provisions of Chapter XI of the Bankruptcy Act, 11 U.S.C. §701, *et seq.* REA's attempt to solve its financial problems, however, failed and on November 6, 1975, it petitioned for, and was adjudicated a bankrupt. REA's trustee, C. Orvis Sowerwine, immediately ordered an embargo on its operations, but with one exception: the trustee permitted REA's Rexco Division to continue operations.

As the Court of Appeals noted, "Rexco amounted to little more than a brokerage business." App. A at 7a. Rexco neither owned nor operated any equipment, but rather solicited and arranged for truckload shipments over

[2] "J.A." refers to the Joint Appendix filed in the Court of Appeals in this case.

irregular routes. App. B at 51a. Between November 25, 1975, and December 11, 1975, many motor carriers filed complaints with the Commission against REA and sought a cease and desist order from the Commission to stop the Rexco operations. Those carriers asserted that the Rexco operations were not express service, and consequently, REA was not authorized to provide that type of service. The American Trucking Associations, Inc., besides asking for a cease and desist order, also sought a dismissal of REA's application for permanent authority for the hub system and a cancellation of the temporary authority. App. B at 29a.

After a hearing, the ICC on November 17, 1976, decided to issue a cease and desist order against the Rexco operations for it concluded that such operations were indeed contrary to REA's authority. App. B at 63a. However, the Commission went further and found that:

> [T]he so-called "Hub System" proceeding must be dismissed. It has been on our docket for 8 years and since the prehearing conference held on January 12, 1970, no further action has been requested by the applicant despite an initial assertion at prehearing that it would be ready to present its operating evidence in April of 1970. Rule 247(b) [*sic*] of our General Rules of Practice requires that an applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof. This, we believe, places some affirmative duty on an applicant to prosecute or seek dismissal. App. B at 58a-59a.

Since the "hub system" application was dismissed, the ICC concluded, the temporary authority must be revoked for it was "conditioned upon the pendency of a corresponding permanent authority application . . . ." App. B at 60a.[3]

[3]The Commission also concluded that the temporary authority revocation was supported by good cause.

REA, petitioner[4] and others sought reconsideration, but on January 28, 1977, the Commission issued its order denying, among others, the various petitions for reconsideration. In its decision on reconsideration, the Commission reaffirmed its view that REA's failure to prosecute its "hub system" application to a conclusion within 8 years justified the dismissal. App. C at 73a.

Upon review in the Court of Appeals pursuant to 28 U.S.C. §2342, the court affirmed the Commission's orders of November 17, 1977, and January 27, 1977, and denied the petition for review. The court concluded that the ICC's interpretation of its Rule 247(f) was not unreasonable, that its decision to dismiss the "hub system" application upon that interpretation of Rule 247(f) was supported by substantial evidence and was not an abuse of discretion.

REASONS FOR GRANTING THE WRIT

I

THE PENALTY APPLIED BY THE ICC TO REDRESS A PROCEDURAL DEFECT WAS SO UNWARRANTED AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF REVIEW

For over eight years the Commission permitted REA to operate an express service which relied primarily upon a temporary authority granted under Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. §310a(a). REA and its predecessor had been the historical and traditional carrier viewed as authorized to provide an express package service, and it was partly based on that history that the Commission authorized REA's restructing of its routes and its continued express operations pending resolution of the "hub system"

[4]Petitioner BRAC was not a party to the ICC proceedings, but sought leave to intervene upon reconsideration. The Commission denied that request in its decision on reconsideration. App. C at 69a-71a.

application. J.A. 877-78. The "hub system" application, however, for a variety of reasons, was not brought to a hearing and remained pending during REA's declining financial posture. Finally, when many competing motor carriers sought the discontinuance of a small part of REA's operations —the Rexco Division—the American Trucking Associations, Inc. also sought the elimination of REA's primary right to exist by seeking a cancellation of the temporary "hub system" authority.

As the record clearly shows, REA did not seek to bring the "hub system" application to a hearing for a number of reasons (*see*, App. A at 14a-15a), and, more importantly, it is respectfully submitted, the Commission did not seek to require a hearing or a dismissal of the application during the eight years that it permitted the application to be pending. App. B at 38a-42a. Rather, the Commission and REA permitted the hub system application to remain unresolved. More importantly, when the Commission did finally take action to control its docket, REA was in the process of transferring its authorities, including the duty to prosecute the "hub system" application to Alltrans Express, U.S.A., Inc., an entity which had clearly expressed an interest to proceed with the pending REA application.

While petitioner BRAC agrees that the Commission's "interpretation of its own rule or regulation is entitled to great deference by the courts" (App. A at 13a), this does not mean that the courts in reviewing an agency action based on such an interpretation may never find such a construction to be unreasonable, or indeed, to have been applied to justify a desired result. *E.g., Trans World Airlines, Inc. v. Hardison*, ____ U.S. ____ (1977) (slip op. at 11 n. 11). Moreover, even if a reviewing court should conclude that the agency's interpretation of its own rule should not be disturbed, the penalty which the agency applied for the violation of that rule or regulation may be found to have

rendered the agency action improper. *E.g., Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-31 (1962). In the case at bar, petitioner BRAC respectfully submits, the Court of Appeals erred in deferring to the ICC's interpretation and application of its Rule 247(f), for, it is submitted, the record shows that the Rule was used to give the desired result — *i.e.*, dismissal of the application and cancellation of the temporary authority—rather than the result being mandated by the conclusion that the Rule had been violated. Petitioner BRAC submits that when an administrative agency first reaches a conclusion, but only thereafter selects facts to rationalize that desired result, the resulting decision of that agency is arbitrary and capricious and should not be countenanced by any reviewing court.

As this Court made clear in *Gilbertville Trucking Co. v. United States, supra*, 371 U.S. at 130, the Commission has "a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate" the remedial purposes of the Act and to enforce our national transportation policy. This requires, it is submitted, that the remedy be designed to remove the violation; and not that the violation be chosen for its remedy.

In the case at bar, a dismissal of the "hub system" application meant that the primary source of REA's operating authority which had been relied upon for over eight years, was taken away for all practical purposes. Whatever source of income the bankrupt estate was to have received from this sale was thus lost. And more importantly, petitioner BRAC submits, whatever chances of reemployment existed in the field in which they had labored for many years was lost to over six thousand employees of the bankrupt. Such drastic results could have been avoided if the Commission, once it had interpreted Rule 247(f) to require of the applicant prompt dismissal or prosecution of its applications, then looked to the facts of the case to determine a just remedy for that violation. This the Commission did not do.

Petitioner BRAC respectuflly suggests that this Court should accept a review of this case to assure that administrative agencies use the adjudicatory process to reason from the facts to appropriate conclusions, and not, as in this case, to rationalize backwards from the desired result to supportive facts and rules.

II

THE RULINGS BELOW IMPAIR AN IMPORTANT ELEMENT OF OUR NATIONAL TRANSPORTATION POLICY

It is well settled that in rendering any decision, the Commission should be guided by our National Transportation Policy as formulated by Congress in a preamble to the Interstate Commerce Act, 49 U.S.C. preceding §1. As this Court has stated: "[T]his policy is the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88 (1957). That policy specifically declares that:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administrated as . . . to encourage fair wages and equitable working conditions . . . . 49 U.S.C. preceeding §1.

Moreover, this Court has stated that "just and reasonable treatment" of transportation employees is an essential aid to the maintenance of an uninterrupted and efficient transportation system for employee morale suffers when the demands of justice are ignored. *United States v. Lowden*, 308 U.S. 225, 235-36 (1939). The Commission and the Court of Appeals, it is submitted, have ignored this important part of our national transportation policy.

In its decision initially cancelling REA's temporary authority, the Commission did not indicate whether it had considered the ramifications of its action upon the thousands of employees of REA, and in its decision upon reconsideration, the ICC stated, without any discussion, that petitioner BRAC in raising such an issue did not present any argument which would "warrant a result different from that found" in the Commission's original decision. App. C. at 71a. And upon review, the Court of Appeals rejected petitioner BRAC's argument that the Commission had ignored the interests of employees, by stating in a footnote that our "National Transportation Policy is not directly concerned with the problems of unemployment and creditors' rights." App. A at 24a n.16. Petitioner BRAC respectfully submits problems of unemployment and creditors' rights are indeed part of the interests of employees included within our national transportation policy, and that the Commission may not ignore such considerations in reaching a decision.

This Court has stated in *Schaffer Transportation Co. v. United States, supra,* that it is erroneous for the Commission to fail to consider all of the relevant factors in our national transportation policy in rendering a decision. While this Court will not disturb a balancing of the numerous considerations that collectively determine where the public interest lies in a particular situation, *Id.* at 92-93, it will invalidate a conclusion that did not evaluate and balance the relevant considerations. *Id.* In this case, as petitioner BRAC informed the Commission in its petition for reconsideration that:

> [T]here are approximately 15,000 employees involved (who either actively worked for REA Express in 1975 or who were on furlough with employment rights) whose average age is approximately 55 years, whose working experience

> has been largely with REA, and whose chances of employment elsewhere are minimal. J.A. at 734.

By cancelling REA's temporary authority, the ICC, without weighing the impact of its actions on those employees, destroyed any chances which those employees may have had to priority of employment with the purchaser of REA's operating rights, or reemployment with a reorganized REA.[5]

Considerations of unemployment and employment rights of employees are, it is submitted, well recognized elements of the interests of employees included within our national transportation policy. *E.g.*, Section 405(b)(1) and (4) of the Rail Passenger Service Act, 45 U.S.C. §565(b)(1) and (4). And indeed, such rights are clearly part of the consideration that employees are to be treated fairly and not to be forgotten offhandedly. This Court, it is respectfully suggested, should accept review of this case in order to prevent an important policy of Congress from being impaired and disregarded.

[5]An attempt to reorganize REA under Chapter 10 of the Bankruptcy Act was recently rejected *In re REA Holding Corp.*, 558 F.2d 1127 (2d Cir. 1977).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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